UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/697,804	10/31/2003	Scott K. Brown	06975-450001	1159

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EXAMINER
SWEARINGEN, JEFFREY R

ART UNIT	PAPER NUMBER
2445	

NOTIFICATION DATE	DELIVERY MODE
05/26/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) ☒ Responsive to communication(s) filed on *25 February 2010*.
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) ☒ Claim(s) *1-37* is/are pending in the application.
    4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) *1-37* is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
    a) ☐ All b) ☐ Some * c) ☐ None of:
      1. ☐ Certified copies of the priority documents have been received.
      2. ☐ Certified copies of the priority documents have been received in Application No. _____.
      3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
    Paper No(s)/Mail Date _____.

4) ☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Response to Arguments

1.   Applicant's arguments filed 2/25/10 have been fully considered but they are not persuasive.

2.   Applicant argues that Zhang in view of Kenner failed to disclose "requesting, using the client application on the client, identical portions of the content from each of the content sources in the list of the content sources; [and] determining, using the client application on the client and based on requesting the identical portions of the content, a performance metric describing an ability for the content source to support the client as measured by the client between each of the at least two of the content sources." Zhang discloses connecting to the "fastest or closest game session or game server for it to join." Column 8, lines 37-39. The "game session" is the identical portion of the content from each of the content sources [peers] in the list of the content sources [peers]. The "fastest or closest game session or game server" is calculated by "determining, using the client application on the client and based on requesting the identical portions of the content, a performance metric describing an ability for the content source to support the client as measured by the client between each of the at least two of the content sources."

3.   Claim 37 remains rejected under 35 U.S.C. 101. Claim 37 amends to add a computer readable medium. No definition exists for a computer readable medium in the specification. Because there is no definition for computer readable medium, the broadest reasonable interpretation (BRI) of computer readable medium is applied. The

BRI of computer readable medium includes transitory media. 1351 OG 212. Therefore,

claim 37 is rejected as encompassing transitory media, which is non-statutory subject

matter. *In re Nuitjen.*

Claim Rejections - 35 USC § 101

4.   35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of
> matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the
> conditions and requirements of this title.

5.   Claim 37 is rejected under 35 U.S.C. 101 because the claimed invention is

directed to non-statutory subject matter. Claim 37 is a means plus function claim. 112,

sixth paragraph has been invoked per *In re Donaldson.*

6.   Applicant has broadly invoked the terms client and network. "The network 120

typically includes hardware and/or software capable of enabling direct or indirect

communications between the client 110 and content sources..." Specification, page 5,

lines 15-17. "In one implementation, the client 110 includes one or more information

retrieval software applications." Specification, page 4, lines 30-31. The instructions for

execution on a client "may be embodied...temporarily in...[a] propagated signal that is

capable of being delivered to the client." Specification, page 4, lines 22-25. "The

controller 135B may be implemented by a software application." Specification, page 6,

lines 19-27. Weighing the evidence, it appears that Applicant is attempting to claim a

content access system in claim 37 that encompasses software *per se* without the

presence of any physical hardware. This is not the case for independent claim 1

(method) or independent claim 19 (a system containing a client with a processor).

7.   Claim 37 amends to add a computer readable medium. No definition exists for a computer readable medium in the specification. Because there is no definition for computer readable medium, the broadest reasonable interpretation (BRI) of computer readable medium is applied. The BRI of computer readable medium includes transitory media. 1351 OG 212. Therefore, claim 37 is rejected as encompassing transitory media, which is non-statutory subject matter. *In re Nuitjen.*

Claim Rejections - 35 USC § 103

8.   The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

9.   Claims 1-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zhang et al. (US 7,133,368) in view of Kenner et al. (US 5,956,716).

10.   In regard to claim 1, Zhang disclosed *a method of enabling a client to access content, the method comprising:*

receiving, on a client, an instruction from a client application indicating a client request to access content; Zhang allowed a Peer to receive a list of potential peers to access. The list is created by a server in column 8, lines 33-51. The request is in the login stage of column 8, line 19.

accessing, by the client application and on the client, a list of content sources

capable of rendering the content for which access is requested by the client; Column 8,

lines 52-54

determining, using the client application and based on requesting the identical

portions of the content, a performance metric describing an ability for the content source

to support the client as measured by the client between each of the at least two of the

content sources; The performance metric is in column 8, lines 55-67, including latency.

An additional hop-by-hop analysis can be performed in column 9, line 23.

comparing the performance metrics for the content sources; Column 9, lines 24-

27.

selecting, using the client application on the client, among the content sources

based on the comparison of the performance metrics for the content sources to identify

a content source to be accessed by the client; and Column 9, lines 24-27.

rendering, using the client application on the client, the identical portion of the

accessed content and a subsequent portion of content that follows the identical portion

of the accessed content from the selected content source. Column 9, lines 24-27.

Establishing the game with the other peer.

11.   Zhang disclosed establishing a connection for transmission of data between two

sources. Zhang discloses connecting to the "fastest or closest game session or game

server for it to join." Column 8, lines 37-39. The "game session" is the identical portion

of the content from each of the content sources [peers] in the list of the content sources

[peers]. The "fastest or closest game session or game server" is calculated by

"determining, using the client application on the client and based on requesting the

identical portions of the content, a performance metric describing an ability for the

content source to support the client as measured by the client between each of the at

least two of the content sources." Zhang failed to disclose a method and system for

switching to a backup source if congestion or node failure prevented maintaining the

necessary level of throughput for a system.

Kenner disclosed a method of accessing video over a network. If a source of

queried video data is unavailable, an alternate source is used to deliver the requested

data. Kenner, column 16, line 62 – column 17, line 11. Priorities and latency are

calculated for the various sources in column 25, lines 12-36.

It would have been obvious to one of ordinary skill in the art at the time of

invention to use the prioritized selection of a connection in Zhang with the alternate

video source selection of Kenner in order to provide a user with the content requested

at the necessary level of QoS while avoiding node congestion and failure as well as

latency issues.

12.   In regard to claim 2, Kenner disclosed *accessing the content source selected.*

Kenner, column 16, line 61.

13.   In regard to claim 3, Kenner disclosed *monitoring communications exchanged*

with the content source selected to determine a selected connection state to determine

if an alternate content source should be accessed. Kenner, column 16, line 62 –

column 17, line 11

14.   In regard to claim 4, Kenner disclosed *repeating the determining and selecting*

when the selected connection state indicates that the alternate content source should

be accessed. Kenner, column 16, line 62 – column 17, line 11

15.   In regard to claim 5, Kenner disclosed *monitoring the state of at least one of the*

content sources not selected from within the list of content sources so that the alternate

content source may be selected when the connection state indicates the alternate

content source should be accessed. Kenner, column 16, line 62 – column 17, line 11

16.   In regard to claim 6, Zhang disclosed *receiving the list of content sources*

includes receiving the list of content sources from a host. Zhang, column 8, line 50

17.   In regard to claim 7, Zhang disclosed *the list of content sources is received in*

response to authenticating. Zhang, column 8, line 19

18.   In regard to claim 8, Zhang disclosed *determining the performance metric*

includes polling at least two of the content sources with a polling request. Zhang,

column 8, lines 33-51

19.   In regard to claim 9, Zhang disclosed *polling at least two of the content sources*

includes transmitting a stream request to each of the content sources in the list of

content sources. Zhang, column 9, lines 9-25

20.   In regard to claim 10, Zhang disclosed *determining the performance metric*

includes identifying a first content source with a response to the polling request that is

received before other responses from other content sources included in the list of

content sources. Zhang, column 9, lines 9-25

21.   In regard to claim 11, Kenner disclosed *determining the performance metric includes identifying a first content source able to sustain an identified throughput rate.* Kenner, column 25, line 17

22.   In regard to claim 12, Kenner disclosed *identifying the first content source able to sustain the identified throughput rate includes identifying the first content source able to sustain the identified throughput rate for a specified duration.* Kenner, column 25, lines 13-37

23.   In regard to claim 13, Kenner disclosed *determining the performance metric includes identifying the content source with a highest throughput rate.* Kenner, column 25, lines 13-37

24.   In regard to claim 14, Kenner disclosed *determining the performance metric includes ranking at least two of the content sources.* Kenner, column 25, lines 13-37

25.   In regard to claim 15, Kenner disclosed *using the ranking to select a backup content source to be accessed when the content source selected for access experiences an interrupt condition.* Kenner, column 25, lines 13-37

26.   In regard to claim 16, Kenner disclosed *maintaining a relative ranking among at least two of the content sources not selected by transmitting subsequent polling requests to the content sources not selected.* Kenner, column 25, lines 13-37

27.   In regard to claim 17, Kenner disclosed *establishing and maintaining a connection to one or more of the content sources not selected from among the list while accessing the content source selected.* Kenner, column 16, line 62 – column 17, line 11; Kenner, column 25, lines 13-37

28.   In regard to claim 18, Kenner disclosed *switching to one of the content sources*

not selected from the list when access to the content source selected is determined to

be inferior to access available using the content source that is accessed. Kenner,

column 16, line 62 – column 17, line 11. Kenner, column 25, lines 13-37

29.   Claim 19 is substantially the same as claim 1.

30.   Claim 20 is substantially the same as claim 2.

31.   Claim 21 is substantially the same as claim 3.

32.   Claim 22 is substantially the same as claim 4.

33.   Claim 23 is substantially the same as claim 5.

34.   Claim 24 is substantially the same as claim 6.

35.   Claim 25 is substantially the same as claim 7.

36.   Claim 26 is substantially the same as claim 8.

37.   Claim 27 is substantially the same as claim 9.

38.   Claim 28 is substantially the same as claim 10.

39.   Claim 29 is substantially the same as claim 11.

40.   Claim 30 is substantially the same as claim 12.

41.   Claim 31 is substantially the same as claim 13.

42.   Claim 32 is substantially the same as claim 14.

43.   Claim 33 is substantially the same as claim 15.

44.   Claim 34 is substantially the same as claim 16.

45.   Claim 35 is substantially the same as claim 17.

46.   Claim 36 is substantially the same as claim 18.

47.   Claim 37 is substantially the same as claim 1.

Conclusion

48.   The prior art made of record and not relied upon is considered pertinent to

applicant's disclosure.

49.   McCanne   US 6,785,704

50.   Applicant's amendment necessitated the new ground(s) of rejection presented in

this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37

CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE

MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later

than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the

examiner should be directed to Jeffrey R. Swearingen whose telephone number is

(571)272-3921. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vivek Srivastava can be reached on 571-272-7304. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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